NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Hartzheim Dodge, Inc. and District Lodge No. 190, Local Lodge No. 1101, International Association of Machinists and Aerospace Workers. Case 32— CA-24548

October 30, 2009

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

DECISION AND ORDER

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on May 20, 2009, the General Counsel issued the complaint on July 31, 2009, against Hartzheim Dodge, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On September 11, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on the same date, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Charging Party joined the General Counsel's motion. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment²

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is

¹ The General Counsel's motion requests default summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

shown. In addition, the complaint affirmatively states that the answer must be received by the Regional Office on or before August 14, 2009, and that, if no answer is filed or if an answer is untimely, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true.³

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a California corporation, has been engaged in the sale and servicing of new and used automobiles at a facility located in San Jose, California. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000, and purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that District Lodge No. 190, Local Lodge No. 1101, International Association of Machinists and Aerospace Workers, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent employed at its San Jose, California facility, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing work described in and covered by "Article 1—Jurisdiction" of the May 1, 2006 through April 30, 2011 collective-bargaining agreement between Respondent and the Union (herein called the Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

Since about May 1, 2006, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since that date, the Union has been recognized as such representative by the Respondent. This recognition has been embodied in the Agreement.

At all times since May 1, 2006, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc., __U.S.L.W.__ (U.S. September 29, 2009) (No. 09-377).

³ Although no further reminder was sent to the Respondent, this does not warrant denial of the General Counsel's motion. *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On about May 15, 2009, the Respondent closed its San Jose, California facility and terminated all of the unit employees (the facility closure).

The facility closure relates to the wages, rates of pay, hours of employment and other terms and conditions of employment of the employees in the unit and is a mandatory subject for the purposes of collective bargaining.

The Respondent engaged in the facility closure without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of the facility closure.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the representative of its employees, and has thereby been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union over the effects of the Respondent's decision to close its San Jose, California facility and terminate all of the unit employees, we shall order the Respondent to bargain with the Union, on request, over the effects of its decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied the opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a man-

ner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).⁴

Thus, the Respondent shall pay the unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 business days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed the facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵

Finally, in view of the fact that the Respondent closed its San Jose, California facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of unit employees em-

⁴ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). The Charging Party asserts that a *Transmarine* remedy alone is inadequate, and requests that the unit employees be made whole for back pay until such time as the Respondent completes its obligation to bargain. The Board has long held that a remedy similar to that described in *Transmarine* is the appropriate remedy for the failure to bargain over the effects of a facility closing. See, e.g., *Melody Toyota*, supra, 325 NLRB at 846 (noting that the judge's order "provides, inter alia, for the Board's standard backpay remedy in effects bargaining cases as modeled after the remedy set forth in *Transmarine Navigation Corp.*"). Accordingly, we find that the remedy provided herein is appropriate.

⁵ The General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

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ployed by the Respondent on or after May 15, 2009, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Hartzheim Dodge, Inc., San Jose, California, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain collectively and in good faith with District Lodge No. 190, Local Lodge No. 1101, International Association of Machinists and Aerospace Workers, the Union, as the exclusive collective-bargaining representative of the employees in the unit about the effects of its decision to close its San Jose, California facility and terminate all of the employees in the unit. The appropriate unit is:

All employees performing work described in and covered by "Article 1—Jurisdiction" of the May 1, 2006 through April 30, 2011 collective-bargaining agreement between Respondent and the Union (herein called the Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union concerning the effects on the unit employees of the Respondent's decision to close its San Jose, California facility, and reduce to writing and sign any agreement reached as a result of such bargaining.
- (b) Pay to the terminated unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appen-

dix" to the Union and to all unit employees employed on or after May 15, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

MAILED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with District Lodge No. 190, Local Lodge No. 1101, International Association of Machinists and Aerospace Workers, the Union, as the exclusive collective-bargaining representative of the employees in the unit about the effects of our decision to close our facility located in San Jose, California and terminate all of the employees in the unit. The appropriate unit is:

All employees performing work described in and covered by "Article 1—Jurisdiction" of the May 1, 2006 through April 30, 2011 collective-bargaining agree-

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ment between us and the Union (herein called the Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of our decision to

close our San Jose, California facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay to the terminated unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

HARTZHEIM DODGE, INC.